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No. 84-1109

In the Supreme Court of the United States

OCTOBER TERM, 1984

HANS BOTHKE, PETITIONER

v.

ERNEST L. RACCA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner challenges the court of appeals' holding that respondent, an IRS revenue officer, was entitled to qualified immunity for his action in filing a Notice of Federal Tax Lien against petitioner's property.

1. On his federal income tax return for 1977, petitioner claimed a deduction in the amount of $7,560 as "Support for the production of Income," and also claimed a "reduction of income" in the amount of $9,250 (Pet. App. 2a). Neither of these deductions is cognizable under the Internal Revenue Code.[1] Pursuant to Section 6213(b)(1) of the Code, the Commissioner on March 5, 1979, sent petitioner a "notice of correction of mathematical error." That notice informed petitioner that a tax deficiency in the

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

amount of $2,762 had been assessed against him for 1977, "on the basis of what would have been the correct amount of tax but for" his mathematical or clerical mistake (I.R.C. § 6213(b)(1)). Petitioner claimed similar deductions on his 1979 return and, on August 11, 1980, the IRS sent him another notice of correction of mathematical error, assessing a deficiency in the amount of $1,621 for 1979 (Pet. App. 2a-3a). The IRS did not send petitioner a statutory "notice of deficiency" before assessing the additional tax for either year.[2]

Petitioner refused to pay the assessments and the case was assigned to respondent Racca, an IRS revenue officer, for collection. On June 2, 1981, Racca received in the normal course of his duties Taxpayer Delinquency Accounts (TDAs) covering petitioner's 1977 and 1979 tax years; these documents indicated that assessments had been made against petitioner for each year on the basis of returns filed by him (CR 45, at 1).[3] The next day, Racca filed a Notice of Federal Tax Lien against petitioner's property in order to perfect the lien granted in favor of the United States by Section 6321 of the Code. Respondent mailed petitioner a copy of that Notice and also sent him a "Final Notice" that is required before the IRS may levy on property subject to a tax lien. Pet. App. 3a.

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[2]Section 6213(a) of the Code generally requires the IRS to send the taxpayer a "notice of deficiency" (defined in Section 6212) before assessing a deficiency in tax or commencing action to collect a deficiency. Section 6213(b), however, sets forth an exception to this rule in the case of mathematical or clerical errors, providing that a notice of correction of such errors "shall not be considered as a notice of deficiency" and that assessment in such cases is not subject to the restrictions of Section 6213(a).

[3]"CR" refers to the docket control number assigned to documents in the original record by the clerk of the district court.

Petitioner brought this action against respondent in the United States District Court for the Central District of California, contending that the IRS had erred in failing to send him a notice of deficiency before making the two assessments. Petitioner sought damages and an injunction against collection of the assessed taxes. The injunctive aspects of the suit were dismissed after the IRS released the tax lien (CR 1, 34). The district court granted summary judgment for respondent on the damages aspects of the suit, concluding that his actions were protected by qualified immunity (Pet. App. 8a-11a). The court found that Racca had acted within the scope of his employment and that petitioner had made no showing that Racca's action in filing the notice of tax lien evidenced bad faith (*ibid.*).[4]

The court of appeals affirmed in an unpublished memorandum (Pet. App. 1a-7a). It found no need to decide whether the errors on petitioner's tax returns were properly to be characterized as "mathematical or clerical errors," in which case the mailing of a notice of deficiency would not have been required before the assessments were made (*id.* at 5a, citing I.R.C. § 6213(b)). Even if the "mathematical error" exception did not apply, the court noted, Section 6213(a) in terms makes the mailing of a notice of deficiency a condition precedent only to the "assessment of a deficiency" or the commencement of a "levy or proceeding in court for its collection" (Pet. App. 5a, citing I.R.C. § 6213(a)). Respondent Racca, the court observed, neither assessed a deficiency against petitioner nor levied against his

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[4]W.J. Terry, another revenue officer, levied on Bothke's property to collect the 1977 tax liability, and Bothke also brought suit for damages against Terry. The court of appeals in that case reversed an award of summary judgment in Terry's favor. *Bothke* v. *Fluor Engineers & Constructors, Inc.*, 713 F.2d 1405 (9th Cir. 1983). In *Terry* v. *Bothke*, No. 83-1506 (July 2, 1984), this Court summarily vacated the court of appeals' decision in that case and remanded for further consideration in light of *Davis* v. *Scherer*, No. 83-490 (June 28, 1984).

property, but simply filed a Notice of Federal Tax Lien, an action that effected no seizure of petitioner's belongings. The court of appeals accordingly concluded that respondent's conduct "did not violate section 6213(a), nor any of [petitioner's] constitutional rights," and that petitioner's lawsuit was "th[e] kind of 'insubstantial lawsuit' for which early termination via summary judgment was appropriate" (Pet. App. 7a, quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 n.35 (1982)).

2. The decision below is plainly correct. It is well established that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Even if one were to assume that the IRS relied incorrectly on the "mathematical error" exception, and hence that it mistakenly failed to send petitioner a notice of deficiency before making the challenged assessments, that mistake would not establish a violation of any statutory or constitutional right *by respondent*. Respondent did not assess the deficiencies; his conduct consisted solely of filing a notice of tax lien in the appropriate public records office. And even if, contrary to the court of appeals' holding, petitioner could show that respondent had violated some statutory provision, respondent plainly was not shown to have violated any "clearly established * * * right[] of which a reasonable person would have known" (*Harlow*, 457 U.S. at 818). Because respondent was not responsible for assessing the deficiencies, and because the TDAs that he received through IRS channels contained no suggestion that the assessments were deficient, it was entirely reasonable for him in the exercise of his tax-collection duties to proceed on the assumption that the assessments were valid. As this court recently held, government employees sued for constitutional violations do not "lose their qualified immunity

merely because their conduct violates some statutory * * * provision." *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 10 (footnote omitted).

Petitioner's contention (Pet. 23-28) that he was entitled to a jury trial on the issue of respondent's liability is meritless. This is precisely the type of insubstantial lawsuit that the Court in *Harlow* (457 U.S. at 818) and *Davis* (slip op. 11) held should be terminated quickly. As the court of appeals recognized (Pet. App. 6a), respondent did not violate any of petitioner's rights; indeed, petitioner had little reason to complain about respondent's conduct at all, since it effected no seizure of petitioner's property and merely served to perfect a tax lien that had arisen automatically when the assessment itself was made (I.R.C. § 6322). The lien, moreover, was released by the IRS "three months later before any of [petitioner's] property had been seized" (Pet. App. 3a). Petitioner's allegations were "bare allegations of malice [that] should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery" (*Harlow*, 457 U.S. at 817-818), and the case was properly disposed of by summary judgment.

It is therefore respectfully submitted that the petition for a writ of certiorari shoul be denied.

REX E. LEE
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